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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

NO. 743

J. W. BOYT, ESTATE OF PAUL A. BOYT, DECEASED, BY DOROTHY F. BOYT AND ROBERT G. RILEY, ADMINISTRATORS, AND B. B. QUINER AND EVA QUINER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NO.....

A. J. BOYT, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS B. ROBERTS,
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INDEX.

Pages

Opinions Below 2

Summary Statement of the Matters Involved..... 2

Jurisdiction 14

Statutes and Regulations Involved 14

Questions Presented 14

Reasons Relied on for the Allowance of the Writs.....16

Conclusion 33

Brief in Support of Petition for Writs of Certiorari.....34

Summary of Argument 34

Argument 35

I. The decision of the Court of Appeals is in error in holding that the trusts were not valid subpartners or joint venturers in the Boyt Partnership for tax purposes, in the absence of a finding of fact by the Tax Court as to whether the parties had a bona fide intent that petitioners and the trusts join together as subpartners or joint venturers in the conduct of that enterprise.....35

II. The decision of the Court of Appeals is in error in holding that the Tax Court's holding that the grantors of the trusts were the owners of the trust property for federal income tax purposes is a finding of fact rather than a conclusion of law....40

III. The Tax Court's decision that grantors of the trusts were the owners of the trust property for tax purposes being a conclusion of law, the Court of Appeals erred in holding that the Tax Court's findings of fact were adequate to support such decision 42

A. The Tax Court made no findings of fact as to the circumstances attendant on the operation of the trusts although there was ample

Page

evidence in the record from which such findings could have been made....43

B. The Tax Court made no finding of any fact attendant on the creation of the trusts which supports its decision, and the Court of Appeals was without the power to supply such a finding by finding as a fact, as it did, that petitioners had an intent not to part with control over the trust property....45

C. The terms of the trust instruments as found by the Tax Court, did not vest petitioners with sufficient control over the trust property to sustain its conclusion that petitioners were the owners of the trust property, and the decision of the Court of Appeals is in error in holding otherwise....47

Conclusion....53

Appendix A....54

CASES CITED.

Pages

Armstrong v. Commissioner, 10 Cir., 1944, 143 F.2d 700....22, 27, 41

Bartholomew v. Commissioner, 8 Cir., 1951, 186 F.2d 315....42

Black v. Commissioner, 1945, 5 T.C. 759....52

Bodden v. Commissioner, 5 Cir., 1950, 182 F.2d 624....26, 39

Brown v. Commissioner, 3 Cir., 1942, 131 F.2d 640....27, 41

Burnet v. Leininger, 1932, 285 U.S. 136, 52 S.Ct. 345, 76 L.Ed. 665....23, 24

Cherry v. Commissioner, 1944, 3 T.C. 1171....51

Cohen v. Commissioner, 1950, 15 T.C. 261....52

Commissioner v. Branch, 1 Cir., 1940, 114 F.2d 985....20, 22, 52

Commissioner v. Culbertson, 1949, 337 U.S. 733, 69 S.Ct. 1210, 93 L.Ed. 1659....12, 16, 17, 23, 25, 26, 29, 31, 32, 38, 39, 40

Commissioner v. Katz, 7 Cir., 1943, 139 F.2d 107....51

Commissioner v. Scottish American Investment Co., Ltd., 1944, 323 U.S. 119, 65 S.Ct. 169, 89 L.Ed. 113....30

Pages

Commissioner v. Tower, 1946, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670 29
Cool's Trusteeship, In re, 1930, 210 Ia. 30, 230 N.W. 353 18, 51
Cushman v. Commissioner, 2 Cir., 1946, 153 F.2d 510 ..... 21, 50, 52
Dyer v. Commissioner, 2 Cir., March 9, 1954, 54-1 USTC Par. 9280, 210 F.2d 23, 39
Fisher v. Commissioner, 1950, 14 T.C. 792 51
Greenberger v. Commissioner, 7 Cir., 1949, 177 F.2d 990 .. 52
Hall v. Commissioner, 10 Cir., 1945, 150 F.2d 304 22, 27, 51, 52
Harris v. Commissioner, 9 Cir., 1949, 175 F.2d 444 ..... 25, 39
Helvering v. Clifford, 1940, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788 ..... 19, 20, 42, 50
Helvering v. Palmer, 2 Cir., 1940, 115 F.2d 368, affirming Palmer v. Commissioner, 1939, 40 B.T.A. 1002 ..... 20, 22, 49, 50
Helvering v. Rankin, 1935, 295 U.S. 123, 55 S.Ct. 732, 79 L.Ed. 1343 ..... 30, 42, 51
Helvering v. Stuart, 1942, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. 154 ..... 18, 19
Helvering v. Ward, 8 Cir., 1935, 79 F.2d 381 42
Helvering v. Wood, 1940, 309 U.S. 344, 60 S.Ct. 551, 84 L.Ed. 796 48
Henry v. Evans, 1895, 95 Ia. 244, 63 N.W. 687 ..... 35, 52
Johanik v. Des Moines Drug Co., 1945, 235 Ia. 679, 17 N. W. 2d 385 ..... 36, 52
Jones v. Norris, 10 Cir., 1941, 122 F.2d 6 52
Keating v. Keating, 1917, 182 Ia. 1056, 165 N.W. 74 .... 18, 51
Klein v. Commissioner, 1952, 18 T.C. 804 30
Leonard v. Commissioner, 1945, 4 T.C. 1271 51
Linsley v. Strang, 1910, 149 Ia. 690, 128 N.W. 932 ..... 18, 51
Loew v. Commissioner, 1946, 7 T.C. 363 51
Lucas v. Earl, 1930, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 ..... 23, 24
Lutcher & Moore Lumber Co. v. Knight, 1910, 217 U.S. 257, 30 S.Ct. 505, 54 L.Ed. 757 32
Maiatico v. Commissioner, D. C. Cir., 1950, 183 F.2d 836 .. 52
McCutchin v. Commissioner, 1945, 4 T.C. 1242 51
Miller v. Commissioner, 6 Cir., 1950, 183 F.2d 247 .. 24, 39, 42

Pages

Miller v. Commissioner, 6 Cir., 1953, 203 F.2d 350.....21
Myer v. Commissioner, 1946, 6 T.C. 77.....51
Nelson v. Lindsey, 1917, 179 Ia. 862, 162 N.W. 3.....36
Palmer v. Commissioner, 1939, 40 BTA 1002, affirmed Helvering v. Palmer, 2 Cir., 1940, 115 F.2d 368 ....20, 22, 49, 50
Preston's Estate v. Commissioner, 2 Cir., 1951, 187 F.2d 531..... 48
Replogle v. Neff, 1936, 176 Okla. 333, 55 P.2d 436.....35
Rupple v. Kuhl, 7 Cir., 1949, 177 F.2d 823.....30
Seabrook v. Commissioner, 5 Cir., 1949, 176 F.2d 605..26, 39
Smith v. Commissioner, 1945, 4 T.C. 573.....51
Spiegel's Estate v. Commissioner, 1949, 335 U.S. 701, 69 S.Ct. 301, 93 L.Ed. 330 .....30, 41
Stern v. Commissioner, 1950, 15 T.C. 521 52
Suhr v. Commissioner, 6 Cir., 1942, 126 F.2d 283 48
Sultan v. Commissioner, 1952, 18 T.C. 715, affirmed 9 Cir., March 10, 1954, 54-1 USTC Par. 9281, 210 F.2d..52
Tomlinson v. Commissioner, 5 Cir., 1950, 182 F.2d 938..26, 39
United States v. Anderson, 6 Cir., 1942, 132 F.2d 98....27, 41
United States v. Morss, 1 Cir., 1947, 159 F.2d 142.....52
United States v. Pierce, 8 Cir., 1943, 137 F.2d 428, affirming 51 F. Supp. 126..... .....27, 40, 42, 51
Wofford v. Commissioner, 5 Cir., 1953, 207 F.2d 749.....21

STATUTES CITED.

Internal Revenue Code:
Section 22(a) (26 U.S.C. 1946 ed. Sec. 22(a)) 14, 22, 27, 42
Section 3797(a)(2) (26 U.S.C. 1946 ed. Sec. 3797 (a)(2)) 14, 30, 31
Section 181 (26 U.S.C. 1946 ed. Sec. 181).....14
Section 182 (26 U.S.C. 1946 ed. Sec. 182).....14

REGULATIONS CITED.

Treasury Regulations 111, Section 29.22(a) 21 (e)(1)..14, 48

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. W. Boyt, Estate of Paul A. Boyt, deceased, by Dorothy F. Boyt and Robert G. Riley, Administrators, and B. B. Quiner and Eva Quiner, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 2, 1954, in the case numbered and entitled on its

docket, No. 14906, J. W. Boyt, etc., Petitioners, v. Commissioner of Internal Revenue, Respondent; and A. J. Boyt, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 2, 1954, in the case numbered and entitled on its docket No. 14,907, A. J. Boyt, Petitioner, v. Commissioner of Internal Revenue, Respondent, which judgments affirmed the decisions of The Tax Court of the United States.

OPINIONS BELOW.

The opinion of the Tax Court (R. 175-187) is reported in 18 T.C. 1057. The opinion of the Court of Appeals (R. 213-223) is reported in 209 F.2d 839.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

These proceedings were filed in the Tax Court of the United States for a redetermination in the federal income tax of each of the petitioners for the calendar year 1943 based on a determination by the respondent that the income from the Boyt Harness Company, a partnership, received by certain trusts created by each petitioner, was taxable to said petitioner. The tax liability of each petitioner for the year 1942 is also involved because of the forgiveness provisions of Section 6, Current Tax Payment Act of 1943. These proceedings, having been consolidated for trial in The Tax Court and for hearing of the petitions for review in the Court of Appeals, will hereinafter be referred to as a single case.

Two issues were presented to the Tax Court for determination. One issue was whether the trusts were subpartners or joint venturers with the actual partners of the Boyt Harness Company, a partnership, for federal income

tax purposes and therefore separately taxable on their distributive shares of income therefrom. On this first issue the Tax Court assumed and so stated in its opinion (R. 186, 187) that the petitioners had conceded that the trusts were neither subpartners nor joint venturers with the actual partners of said partnership, and consequently it did not decide this issue. This assumption was erroneous for the statement of facts hereinafter set forth shows no such concession was made.

The second issue was joined on petitioners' contention, as stated by the Tax Court, "that the trusts were validly established under the laws of Iowa by completed, irrevocable gifts of designated percentage interests * * * in the partnership assets, and hence subject to tax on the income therefrom", and respondent's contention, as stated by the Tax Court, "that, for tax purposes, the trusts amounted to nothing more than assignments of percentages of the grantors' future earnings in the Boyt Partnership, as tax saving devices." (R. 187) The Tax Court decided this issue in favor of the respondent except that the court neither found nor held the trusts to be tax saving devices.

Petitioners at all times material herein have been residents of the City of Des Moines, Iowa, and their income tax returns in question were filed with the Collector of Internal Revenue at Des Moines, Iowa. The action appearing in the name of the Estate of Paul A. Boyt, Deceased, was commenced by Paul A. Boyt. After his demise, his duly qualified administrators, Dorothy F. Boyt and Fred H. Quiner, were substituted as petitioners. After the petition for review was filed in the Court of Appeals, Fred H. Quiner resigned as such administrator and Robert G. Riley was substituted in his stead. (R. 210)

In January of 1934, petitioners herein, together with other relatives and P. J. Kurtz, who is unrelated, formed the Boyt Harness Company, an Iowa corporation, for the

purpose of continuing the family business of manufacturing horse equipment. (R. 86)

Early in 1940, the Boyt Harness Company began to bid on Government contracts for the equipage of the armed forces, but, because of somewhat limited resources and credit, was not able to procure bid bonds for sizeable contracts. The then requirement for bid bonds made even the submission of bids quite expensive. In order to improve its position with respect to procurement of bid bonds, the Boyt Harness Company (hereinafter called the Boyt Corporation, as it is in the Tax Court decision, to distinguish it from two other business entities of the same name) on November 4, 1940, entered into a limited partnership with Glen G. Herrick (R. 86, 87) as evidenced by Exhibit 1, "Certificate of Limited Partnership of Boyt Harness Company" (R. 70-76), which certificate was duly recorded as required by Iowa law. This limited partnership (hereinafter called the Limited Partnership, as it is in the Tax Court decision) consisted of the Boyt Corporation, as general partner, and Glen G. Herrick, as the limited partner, who made a contribution of special capital in the amount of $500.00. The certificate further provided that the business should consist of the procurement and execution of Government contracts; that the Limited Partnership should continue for three years unless sooner terminated on 30 days notice by Herrick; that the Boyt Corporation should contribute such tools and equipment as it might have (new and special equipment to be purchased by the Limited Partnership), labor and materials necessary to the business.

Herrick, on his part, agreed to procure bid bonds (to be paid for by the Limited Partnership), and to finance, on demand notes, any contracts procured. He retained the right to approve all bids made, the control of the bookkeeping and a veto power over disbursements. The Limited Partnership agreed to reimburse the Boyt Corporation for

its actual expenses of producing Limited Partnership goods, but with no allowance for overhead, equipment, premises, depreciation or salaries. The certificate further provided that profits and losses on contracts executed during the first year should be divided two-thirds to the Boyt Corporation and one-third to Herrick and thereafter three-fourths and one-fourth, provided, however, that Herrick's loss was limited to his contribution of $500.00. (R. 70-75)

After the Limited Partnership was formed, it entered into the procurement and fulfillment of Government contracts, while the Boyt Corporation, in addition to its specified functions as general partner of the Limited Partnership, continued independently with its business of producing goods for the civilian market. (R. 87)

With the consent of Herrick as limited partner (R. 88), the stockholders of the Boyt Corporation decided to dissolve the corporation, to organize a partnership composed of all the then stockholders, and to transfer to said partnership, as its capital, all of the assets of the Boyt Corporation. (R. 86)

Pursuant to this plan, Articles of Partnership (Ex. 8, R. 76-79) of the Boyt Harness Company (hereinafter called the Boyt Partnership as it is in the Tax Court's decision) were executed by all of the former stockholders. The following list shows the name of each partner, his percentage interest in the capital of the Boyt Partnership, and explanatory notes to aid the Court in identifying the parties:

J. Walter (J.W.) Boyt	17%	Petitioner herein; brother of A. J. Boyt and Paul A. Boyt. (R. 86)
Helen F. Boyt	17%	Wife of J. W. Boyt, now deceased. (R. 84)
A. J. Boyt	11%	Petitioner herein; brother of J. W. Boyt. (R. 86)
Marjorie P. Boyt	11%	Wife of A. J. Boyt. (R. 41)
Paul A. Boyt	10%	Petitioner herein, now deceased; brother of J. W. and A. J. Boyt. (R. 86)
Dorothy F. Boyt	10%	Wife of Paul A. Boyt. (R. 94)
Barbadina Boyt	8%	Mother of J. W. Boyt, A. J. Boyt and Paul Boyt. (R. 86)
B. B. Quiner	6%	Petitioner herein, cousin of J. W. Boyt, A. J. Boyt and Paul A. Boyt. (R. 104)

Elizabeth M. Boyt	4%	Sister of J. W. Boyt, A. J. Boyt and Paul A. Boyt. (R. 86)
J. E. Green	3%	Cousin of J. W. Boyt, A. J. Boyt and Paul A. Boyt. (R. 103-104)
P. J. Kurtz	3%	Not a relative of the Boyts. (R. 103)

Profits and losses were shared by the partners in the same proportions as their capital investments. These Articles of Partnership, duly executed by the parties on September 15, 1941 (R. 79), were effective as of August 30, 1941, the date of dissolution of the Boyt Corporation. (R. 86) The Boyt Partnership took over all of the assets and liabilities of the Boyt Corporation, including all the rights and liabilities of the general partner in the Limited Partnership with Herrick. (R. 78, 88)

In a letter dated May 23, 1942 (Petitioners' Ex. 10, R. 111), J. W. Boyt, acting in behalf of himself and the other petitioners, requested Paul A. Martin, then counsel for the parties, to prepare a plan whereby these parties might make "outright" gifts in trust for their respective minor children of portions of their interests in the Boyt Partnership.

On September 14, 1942, but as of June 1, 1942, petitioners executed ten declarations of trust, each identical in form, with the grantors, trustees, the beneficiaries (who were minor children of the respective grantors), and the percentage of the Boyt Partnership capital transferred to each trust, being as follows (R. 68, 69, Ex. 9, R. 80-85):

Grantor	*Initial Trustees*	*Beneficiaries*	*Percentage of Capital Transferred*
J. Walter Boyt	J. Walter Boyt	Robert Francis Boyt	2½%
	Helen F. Boyt	James O. Boyt	2½%
		Kathleen M. Boyt	2½%
Arthur J. Boyt	Arthur J. Boyt	Arthur J. Boyt, Jr.	1½%
	Marjorie P. Boyt	Richard D. Boyt	1½%
		Christie Ann Boyt	1½%
Paul A. Boyt	Paul A. Boyt		
	Dorothy F. Boyt	Shirley Boyt	2½%
B. B. Quiner	B. B. Quiner	Quentin B. Quiner	1 %
		Eva Jane Quiner	1 %
		David B. Quiner	1 %

A separate declaration was executed with respect to each beneficiary and served the dual purpose of conveying to trustees a portion of grantor's capital in the Boyt Partnership and of impressing this property with a trust in favor of the named beneficary.

In each case, the property transferred consisted of a stated percentage (shown just above) "sub-partnership (with myself) interest in said partnership" taken from the grantor's stated percentage of capital interest therein. Par. II excludes the trustees from participation in the partnership management, "it being my intention hereby to establish the relation of sub-partnership between myself and said trustees". In Par. V the partnership is directed to "segregate the said * * * sub-partnership interest * * * and thereafter make and maintain such entries in its records as shall evidence my irrevocable establishment of said sub-partnership trust and the full and complete delivery to said trustees of all my right, title and interest in and to the said * * * sub-partnership interest * * *". Par XI reserves to the grantor the privilege of repurchasing the sub-partnership interest at book value. (Ex. 9, R. 80-85)

The trusts were irrevocable and for the benefit of the named beneficiary. Par. I appoints the grantor and his spouse as initial trustees with survivorship but with right to the survivor to appoint additional trustees. Par. III sets forth the trustees' powers in the management of the trusts. Par. VI permits the trustees, in their discretion, to make payments of income to the beneficiaries for purposes other than on account of any legal obligation of the grantor or his spouse. Par. VII provides for termination of the trusts, at age 25, on the request of the beneficiary, as to one-half thereof, and for complete termination and vesting in the beneficiary at age 35. Pars. VIII, IX and X provide for the succession of the issue of any beneficiary or for the succession of the brothers and/or sisters of any beneficiary dying

without issue. Reversion to the grantor and his spouse, jointly, is permitted if, but only if, all of their children die without issue prior to vesting. By Par. XIII an alternative method of termination is provided at age 30 by consent of all of the then surviving children of the grantor.

In order that the dollar amount of capital of each partner and each trust might be definitely ascertained, the parties caused complete inventories and audits to be made both of the Limited Partnership (because of the large Boyt Partnership investment therein) and of the Boyt Partnership on May 31, 1942. The Boyt Partnership audit (Petitioners' Ex. 13, 133-135) shows the balancing out of the partners' capital accounts for the period prior to June 1, 1942, and, in the last column thereof, the new capital accounts of each partner and each trust. The reduction in the capital of each donor resulting from the gift of a portion thereof to the trusts is clearly shown by comparing the partners' capital accounts on May 31, 1942, prior to creation of the trusts (R. 101), and on June 1, 1942, after creation of the trusts. (R. 102) For example, on May 31, J. W. Boyt owned capital in the amount if $68,091.04. (R. 101) He transferred to each of his trusts capital of $10,937.42 or a total of $32,812.29. His capital investment was thereby reduced to $35,278.75. (R. 102)

The Articles of the Boyt Partnership having stated that its capital was owned by certain named persons, and having specified the proportionate amount thereof owned by each and that the profits were to be divided among those persons in the same proportion (Ex. 8, R. 77), a "Notice of Amendment of Articles of Partnership" dated June 1, 1942, was executed by all of the partners and by the trusts. (Petitioners' Ex. 11, R. 113-115) Said notice recited the division of partnership income prior to the creation of the trusts and stated that a change in the ownership of the capital had occurred upon the creation of certain trusts and then pre-

scribed how the net income was to be divided from and after June 1, 1942. The division so prescribed was identical with the amount of capital owned by the partners and the trusts.

The manner in which the amended articles of partnership were carried out is clearly shown by the ledger. (Petitioners' Ex. 15 R. 96-102, 149-171) The respective capital contribution of each partner and each trust was shown on June 1, 1942. On December 31, 1942, each partner and each trust was credited with his proportionate share of the net profits for the period June 1 to December 31, 1942, debited with his withdrawals for the same period and a balance struck showing his new investment (consisting of his original investment plus the reinvestment of unwithdrawn profits). For the year 1943, the same procedure was followed. The distribution of net profits for that year is further shown in the Iowa Income Tax Return for that year (Petitioners' Ex. 12, R. 125) to have been in exact proportion to the respective capital investments of the partners and trusts.

The trusts were created for the safety and protection of the respective grantor's children. (R. 92, 95) No grantor or trustee has at any time used any trust corpus or trust income for his own benefit or for the payment of his own legal obligations. (R. 94, 95) Withdrawal of funds of the trust were used for the purchase of government bonds, corporate stock, life insurance and for the payment of income taxes payable by the trusts. (Petitioners' Ex. 15, R. 95, 99-100, 163-171)

While the Tax Court made no finding of fact with respect thereto, the record shows clearly that the Boyt Partnership was an enterprise in which capital was a material income-producing factor. The Boyt Partnership, at the time of the creation of the trusts, had an investment of $417,750.93 (approximately two-thirds of the net worth) in the Limited

Partnership. (Petitioners' Ex. 14, R. 143) This investment is verified by the Boyt Partnership audit (Petitioners' Ex. 13, R. 129) although the auditor erroneously labeled it an "Account Receivable" instead of "Investment." In addition to this investment, the Boyt Partnership audit also shows Accounts Receivable of $73,697.83, Real Estate equity of $2,754.37 and Fixed Assets (operating equipment) of a book value of $10,084.57.

That investment of capital was the basis for the distribution of earnings is evidenced not only by the fact that all net profits were distributable in proportion to capital as pointed out above, but by the additional fact that all partners who performed services for the partnership were fully compensated therefor by the payment of substantial salaries (Petitioners' Ex. 12, R. 121, Petitioners' Ex. 13, R. 133, Petitioners' Ex. 15, R. 101), whereas no salaries are shown either for inactive partners or for the trusts. Such salaries were deducted prior to determination of net income for distribution, hence capital investment was the sole basis for the distribution of such income.

The only findings of fact made by the Court relative to the trusts, besides a summary of the provisions of the trust declarations (R. 182, 183), were as follows: That the trust declarations were executed by petitioners (R. 182); that a "notice of amendment to the articles of partnership" was executed by the Trusts and the partners of the Boyt Partnership "setting forth the percentage share of the net income of Boyt Partnership distributable to each partner and to each of the seventeen trusts, beginning June 1, 1942"; that "an audit was made of the books of account of the Boyt Partnership as of May 31, 1942, and based thereon accounts were set up showing the percentage interest and dollar share of the capital account of each trust"; and that "the drawing account for each trust showed the percentage of interest and the dollar share of the partnership's net income." (R. 184)

On these meager findings of fact the Tax Court in its opinion, decided (1) that "the trusts contributed nothing to the enterprise and their creation merely provided a means whereby they became passive recipients of shares of income earned by the grantor-partners"; (2) that, "the grantors in their individual capacities, aside from being the trustees, retained complete dominion and control over the corpus of the trusts, that is the assigned percentage interest in partnership assets"; (3) that "the grantor-petitioners actually earned the income in question and under the doctrine of *Lucas v. Earl*, 281 U.S. 111 and *Burnet v. Leininger*, 285 U.S. 136, * * * the trusts are not recognized for tax purposes" and the petitioners are taxable on all of the trusts' distributive shares of the net income of the Boyt Partnership for each of the years 1942 and 1943. (R. 187)

The Tax Court reached the foregoing decision without making any findings of fact with respect to the following: (1) whether the trust declarations were genuine and not lacking in bona fides; (2) did each declaration of trust coupled with the execution of the Notice of Amendment to the Articles of Partnership vest ownership absolutely in the trustees of said trust of a portion of the capital of the Boyt Partnership; (3) what, if any, rights and powers which are the incidents of ownership of property did petitioners retain with respect to the trust property and the income arising therefrom; (4) what changes, if any, in the economic benefits of ownership of the trust property resulted from the creation of the trust and transfer thereto of portions of capital of the Boyt Partnership; (5) what amounts of partnership income actually were distributed to the trusts and to what uses and purposes was such income actually put; (6) was the undistributed net income of the Boyt Partnership divided among the partners and the trusts in proportion to the amount of capital owned by each partner and trust by actually crediting the same on the books of the part-

nership to the capital accounts of the partners and the trusts; (7) whether capital was a material factor in the production of the income of the Boyt Partnership; (8) whether the partners of the Boyt Partnership who rendered personal services were compensated therefor by salaries; (9) whether the net income of the Boyt Partnership after payment of salaries to active partners was produced by its capital; (10) was it the real and true intent of each petitioner and of the trust created by him to enter into the relation of subpartnership; (11) was it the real and true intent of the trustees of each trust and all the partners of the Boyt Partnership to thenceforth enter into and join a joint venture in conducting the business of said partnership.

That findings of fact could have been made on each of the foregoing matters is shown by the evidence heretofore summarized in this statement.

The Court of Appeals viewed the case as governed by the rule announced by this court in *Commissioner v. Culbertson*, 337 U.S. 733, at pages 742 and 743. (R. 218, 219, 222) After quoting such rule the court below stated, "With the aid of this standard, we examine the record in this case." (R. 219)

In its examination of the record the court below wholly ignored the fact that the Tax Court made no finding of fact on the question which this court in the *Culbertson* case (337 U.S. 742, 743) declared was essential to a determination of the validity of a family partnership for federal income tax purposes, i.e., whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." Instead of remanding the case for such a finding by the Tax Court, as was done by this court in the *Culbertson* case, the Court of Appeals held that the trusts were not valid subpartners or joint venturers because the petitioners retained the beneficial ownership of the trust res for all practical purposes and hence the trust contributed nothing to the enterprise. (R. 222, 223) In order

to reach this result the court below treated the Tax Court's decision that the petitioners remained the owners of the trust property as a finding of fact to be made from "an analysis of the facts attendant upon the creation, execution and operation of the trusts, together with a consideration of the terms contained in the trust instruments." (R. 219) The only fact attendant upon the creation and execution of the trusts mentioned by the Court of Appeals in its opinion is J. W. Boyt's letter of May 23, 1942, to his counsel (Petitioners' Ex. 10, R. 111) which was not referred to by the Tax Court in either its findings of fact or its opinion. The Court of Appeals found as a fact that this letter was "indicative of petitioner's intent not to part with control over the partnership assets granted in the trusts." (R. 219, 220)

The only facts attendant upon the operation of the trusts mentioned by the court below are the provision in the limited partnership agreement requiring Herrick's consent to the distribution of profits of that partnership together with his testimony that there were no withdrawals of any earnings of the limited partnership. (R. 221) None of these matters were mentioned by the Tax Court in either its findings of fact or its opinion.

The consideration by the court below of the terms of the trust instruments led it to hold that, "The trusts were set up in such a manner as to leave the grantors the substantial owners of the trust property and the income therefrom." (R. 223) From this consideration of the terms of the trust instruments and its analysis of the facts attendant upon the creation, execution and operation of the trusts, the Court of Appeals concluded there was substantial evidence supporting the Tax Court's decision (R. 219) and affirmed the case. (R. 223)

All of petitioners' primary assignments of error before the Court of Appeals were based on the contention that the Tax Court's findings of fact were wholly inadequate to sup-

port its decision that petitioners remained the owners of the trust property for tax purposes. The Court of Appeals summarily disposed of this contention in one short paragraph of its opinion (R. 223) reading as follows:

> "Petitioners urge that the findings of fact made by the Tax Court are insufficient to sustain its decision. Although the findings are not as extensive and detailed as they might have been, they form an adequate basis upon which to rest the decision."

JURISDICTION.

The judgment of the United States Court of Appeals was entered February 2, 1954. (R. 224) On February 19, 1954, petitioners filed a timely petition for rehearing which the Court of Appeals denied on March 3, 1954. (R. 235) The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 928, 28 U.S.C., Section 1254.

STATUTES AND REGULATIONS INVOLVED.

The pertinent portions of the Internal Revenue Code (Sections 22(a), 181, 182 and 3797) and the pertinent provisions of the Treasury Regulations (Reg. 111, Sec. 29.22 (a)-21) are set forth in Appendix A, infra, pp. 54 and 55.

QUESTIONS PRESENTED.

1. Did the Court of Appeals, in the absence of a finding of fact by the Tax Court on the question of whether the parties had a good faith intent to join together as subpartners or joint venturers in the conduct of the Boyt Partnership enterprise, err in holding that the trusts were not such subpartners or joint venturers for federal income tax purposes?

2. Did the Court of Appeals err in holding that the Tax

Court's decision that the grantors of the trust were the owners of the trust property for federal income tax purposes is a finding of fact rather than a conclusion of law?

3. If the Tax Court's decision that the grantors of the trusts were the owners of the trust property for federal income tax purposes is a conclusion of law, did the Court of Appeals err in holding that the Tax Court's findings of fact were adequate to support such decision?

4. Did the Court of Appeals err in holding that the provisions of the trust instruments were provisions through which the grantors retained sufficient incidents of ownership to make them the owners of the trust property for federal income tax purposes?

5. Did the Court of Appeals, in holding that petitioners stood in relatively the same position with respect to the trust property after the execution of the declarations of trust as before, err in failing to give effect to decisions of the Supreme Court of Iowa holding that a trustee is a fiduciary with respect to trust property and, as such, is required to exercise his powers solely in the best interests of the beneficiary?

6. Did the Court of Appeals err in finding as a fact that J. W. Boyt's letter of May 23, 1942, is indicative of petitioners' intent not to part with control over the partnership assets granted in the trusts?

7. In deciding that the trusts were neither valid subpartners nor joint venturerers for tax purposes, did the Court of Appeals err in adjudicating an issue not decided by the Tax Court?

8. If the Tax Court's decision that the grantors of the trusts were the owners of the trust property for federal income tax purposes is a finding of fact, did the Court of Appeals err in holding that there was substantial evidence to support such finding?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

I.

The Court of Appeals in this case has decided Federal questions in a way probably in conflict with the applicable decisions of this Court.

A.

The Court of Appeals has decided the Federal question of whether the trusts were valid subpartners or joint venturers for Federal income tax purposes in a way in conflict with the decision of this Court in Commissioner v. Culbertson, 337 U.S. 733.

The Court below professes to decide the case on the basis of the rule announced by this court in *Commissioner v. Culbertson*, 1949, 337 U.S. 733, 69 S.Ct. 1210, 93 L.Ed. 1659. After quoting the statement of the rule as it appears on pages 742 and 743 of this court's opinion in that case, the Court of Appeals stated (R. 219):

> "With the aid of this standard we examine the record in the present case."

Adherence to the *Culbertson* rule is again expressed later in the opinion (R. 222) as follows:

> "And the same principles for determining the validity of a partnership, as laid down in the *Culbertson* case, supra, apply in determining the validity of a subpartnership or joint venture. *U.S. v. Atkins*, supra; *Stoffield v. Commissioner*, 7 Cir., 1953, 203 F. 2d 667."

The principles laid down by this court in the *Culbertson* case are (1) the question of whether a family partnership is valid for federal income tax purposes depends on whether

the parties had a bona fide intent to join together as partners in the conduct of the enterprise and (2) whether the parties had such an intent is a question of fact to be found by the Tax Court. This court expressly held that in the absence of such a finding no determination of the validity of a family partnership for tax purposes can be made. It was the lack of such a finding that caused this court to remand the *Culbertson* case to the Tax Court for a finding of fact as to which of respondent's sons "was there a bona fide intent that they be partners in the conduct of the cattle business." (337 U.S. 748)

The Tax Court in the present case did not, either in its findings of fact (R. 177-184) or its opinion (R. 184-187) make any findings of fact whatever as to whether each petitioner and the trustees of each trust created by him had a bona fide intent to join together as subpartners or joint venturers in the Boyt Partnership. In the absence of this finding, and being unable, as an appellate court, to itself make such a finding, the Court of Appeals was clearly bound under the decision of this court in the *Culbertson* case to reverse the decision of the Tax Court and remand the case for the purpose of having that court make a finding on this essential question of fact. The court below did not do this but instead held that the trusts were not valid subpartners or joint venturers because they contributed neither services nor capital to the Boyt Partnership enterprise. (R. 222, 223) In deciding that the trusts, as the alleged subpartners or joint adventurers, had not satisfied these tests, the court below fell into the same error condemned by this court in the *Culbertson* case (337 U.S. 743, 744). In so doing and in deciding the case without any finding of fact by the Tax Court on the question of the parties' good faith intent, the court below was clearly guilty of deciding a federal question in a way contrary to an applicable decision of this court.

B.

The Court of Appeals has decided the Federal question of whether the grantors of the trusts were the owners of trust property for Federal income tax purposes in a way in conflict with the decision of this Court in Helvering v. Stuart, 317 U.S. 154.

In deciding the federal question of whether the grantor of a trust is taxable on the income therefrom under the Internal Revenue Code, this court has held that a Court of Appeals must look to the law of the state where the trust instrument was executed and the grantor and the trustees reside in order to determine the legal interests and rights created by such instrument. *Helvering v. Stuart,* 1942, 317 U. S. 154, 162, 163, 63 S.Ct. 140, 87 L.Ed. 154.

Each trust instrument in the present case was executed in Iowa where the parties thereto resided. Under the decisions of the Supreme Court of Iowa the trustees of the trust created by such instrument were required by law to exercise their powers in the best interests of the beneficiaries and were prohibited from exercising such powers for their personal benefit. *In re Cool's Trusteeship,* 1930, 210 Ia. 30, 230 N.W. 353; *Keating v. Keating,* 1917, 182 Ia. 1056, 165 N. W. 74; *Linsley v. Strang,* 1910, 149 Ia. 690, 128 N.W. 932.

The court below in holding that petitioners "stood in relatively the same position with respect to the property after the execution of the declarations of trust as before," (R. 221) necessarily gave no effect whatever to the foregoing decisions of the Supreme Court of Iowa for had it done so, it would have been required to hold that whereas, prior to the creation of the trusts the petitioners held the property for themselves as absolute owners, after the creation of the trusts, the petitioners held the property in a fiduciary capacity for the trust beneficiaries. It therefore clearly appears that the decision of the court below decides a fed-

eral question in a way in conflict with the decision of this court in *Helvering v. Stuart*, supra.

II.

The decision of the Court of Appeals is in direct conflict with the decisions of Courts of Appeal for other circuits on the same matters.

A.

The opinion's application of the rule of Helvering v. Clifford, 309 U.S. 331, is directly contrary to the decisions of other Courts of Appeal.

The court below held that "petitioners retained beneficial ownership of the trust res for all practical purposes" (R. 222) and that "the declarations of trust passed nothing more than mere legal title to the trust corpus." (R. 223)

This holding is again stated in the last paragraph of the opinion (R. 223) as follows:

> "The trusts were set up in such a manner as to leave the grantors the substantial owners of the trust property and the income therefrom."

The provisions of each trust declaration on which the Court of Appeals predicated this holding, without citing any authority therefor, are summarized in the opinion (R. 220) as follows:

> "Article I of the instrument provides that the grantor and his/her spouse shall be the original trustees. Article II states that no trustee, as such, shall participate in the management of the Boyt Partnership. Article III grants the trustee sole discretion to hold, invest, buy, sell, mortgage, or pledge any or all of the trust fund and its accumuation. Article VI gives the trustees compete discretion in paying income from the trust to the

beneficiary thereof. Article X provides for reversion of the trust estate to the grantor and his/her spouse upon the death of the grantor's children without issue. Article XI reserves to the grantor the right to repurchase the interest granted for the book value thereof as shown by the last preceding audit. Article XII exculpates the trustee for all acts except intentional wrongdoing. Article XVI forbids alienation of the trust estate by the beneficiary thereof."

The aforesaid holding of the court below is in direct conflict with the following decisions of Courts of Appeal of other circuits holding that trust provisions similar to those in the instant case do not create incidents of ownership sufficient to warrant a determination by the Tax Court that the grantor remained the owner of the trust property for federal income tax purposes under the rule of *Helvering v. Clifford*, 1940, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788.

1. *Commissioner v. Branch*, 1 Cir., 1940, 114 F.2d 985:

The trust provisions in this case similar to those in the present case were as follows: (1) the grantor was also a trustee; (2) the trustees had discretionary powers to hold, invest, buy, sell and mortgage or pledge the trust property; (3) each trustee was exculpated from all liability except for his own wilful act, neglect or default; and (4) the trust property was to revert to the grantor if he outlived the beneficiary.

2. *Helvering v. Palmer*, 2 Cir., 1940, 115 F.2d 368:

The trust provisions in this case (as they appear in the Tax Court's Findings of Fact (40 B.T.A. 1002-1004)) similar to those in the present case are as follows: (1) grantor and his wife were trustees; (2) trustees had power to receive, hold, manage, invest, reinvest, sell or exchange the trust estate; (3) trustees were not liable except for their wilful misconduct; (4) grantor had the right to reacquire the trust

property by purchase at a fair price to be fixed by a specified formula (in which book value was a major factor).

3. *Cushman v. Commissioner*, 2 Cir., 1946, 153 F.2d 510:

The trust provisions in this case similar to those in the present case were as follows: (1) grantor and his wife were trustees; (2) trustees had power to hold, invest and manage the trust estate; (3) trustees had discretion to accumulate or distribute the income of the trust property; and (4) trust property was to revert to grantor on happening of certain contingencies.

4. *Wofford v. Commissioner*, 5 Cir., 1953, 207 F.2d 749:

The trust provisions in this case similar to those in the present case were as follows: (1) grantors, who were husband and wife, were trustees; (2) the trustees had the power to manage, control and mortgage trust property; and (3) the income of the trust could be paid to the beneficiaries or accumulated.

5. *Miller v. Commissioner*, 6 Cir., 1953, 203 F.2d 350:

The trust provisions in this case similar to those in the present case were as follows: (1) grantors, who were husband and wife, were trustees, and (2) the trustees had the power to control the management and investment of the trust funds. The trust instrument contained two additional provisions, not found in the Boyt trust declarations, which furnish more of a basis for finding that the grantors remained the owners of the trust property than do any of the trust provisions in the instant case. One of these provisions gave the trustees the right to pay themselves whatever compensation, as trustees, they saw fit, up to the annual income of the trusts. The other provision made accumulation of the income mandatory for the life of the trust and the trust could not terminate until after the death of the grantor-trustees. Notwithstanding these provisions the court held for the taxpayers.

6. *Armstrong v. Commissioner*, 10 Cir., 1944, 143 F.2d 700:

The trust provisions in this case similar to those in the present case were as follows: (1) grantor was trustee; (2) trustee could borrow, mortgage, pledge, transfer in trust or otherwise encumber the trust estate and could invest the principal or income thereof as he saw fit; (3) the beneficiaries could not encumber the estate and it was not subject to their debts and liabilities.

7. *Hall v. Commissioner*, 10 Cir., 1945, 150 F.2d 304:

The trust provisions in this case similar to those in the present case were as follows: (1) grantor was a trustee; (2) trustee had powers of investment, contract, sale, lease and otherwise over the trust property; (3) trustee had discretionary power to distribute all of the trust income to the beneficiaries at any time; and (4) in the event of the death of all beneficiaries without issue the trust estate was to descend to the trustor.

Petitioners here point out that each of the provisions mentioned by the court below except Article II which states that no trustee, as such, shall participate in the management of the Boyt partnership, was involved in some one of the seven cases just cited. In *Commissioner v. Branch*, supra, and *Helvering v. Palmer*, supra, the first two cases cited, the Tax Court's decision in each that the provisions of the trust instrument did not make the grantor the owner of the trust property for federal income tax purposes, was affirmed by the Court of Appeals. In the last five cases the Tax Court's decision in each case holding that the trust provisions before it made the grantor the owner of the trust property for tax purposes under Section 22(a) of the Internal Revenue Code, was reversed by the Courts of Appeal. It is obvious therefore that the decision of the Court of Appeals in the instant case holding that similar trust provisions had the effect of making "the grantors the substantial owners

of the trust property and the income therefrom" (R. 223) is in direct conflict with the decisions of the Courts of Appeal of five other circuits in these seven cases.

B.

The opinion is directly contrary to the decisions of other Courts of Appeal holding that the rule of Commissioner v. Culbertson requires an explicit finding, as a fact, of lack of good faith intention before a partnership, joint venture or subpartnership can be ignored for tax purposes.

As pointed out earlier in this petition, the Tax Court did not, either in its findings of fact (R. 177-184) or opinion (R. 184-187) make any finding of fact as to whether the parties intended in good faith to join together as subpartners or joint venturers. Notwithstanding the absence of such a finding, the court below proceeded to determine that the trusts were not joint venturers or subpartners, basing such determination on the test of whether the trusts performed any services or contributed any capital. Resolving this test in favor of respondent, it concluded that the doctrine of *Lucas v. Earl*, 281 U.S. 111, and *Burnet v. Leininger*, 285 U.S. 136, was applicable. (R. 222, 233) This disposition of the case by the court below is in direct conflict with the following decisions of Courts of Appeal for other circuits.

1. *Dyer v. Commissioner*, 2 Cir., March 9, 1954, 54-1 USTC, Par. 9280:

In this case petitioners, who were members of a partnership, entered into a joint venture with another party with respect to certain shipments of sugar syrup from Cuba. The wives and a half-sister of the partners were offered and accepted part interests in the partnership's share in the

venture, together with the risks involved. The Tax Court made no finding of fact as to whether the parties in good faith intended that the wives and half-sister should be joint venturers with petitioners. Instead that court held that, because the wives and half-sister contributed neither capital nor services to the venture, the petitioners were taxable on all of the profits under *Lucas v. Earl*, 281 U.S. 111, and *Burnet v. Leininger*, 285 U.S. 136. In speaking of the status of the wives, the Tax Court used almost identically the same language as that used by the Tax Court in the present case in referring to the status of the trusts, when it said:

> "They were merely the passive recipients of a share of the profits earned by the real participants in the joint venture."

The Court of Appeals, in rejecting the government's argument based on *Burnet v. Leininger*, said:

> "Finally, and above all, the Supreme Court had not yet required, as it later did in *Culbertson*, that there be an explicit finding, as a fact, of lack of good faith intention before an apparently valid joint venture agreement could be ignored.
>
> The judge here made no such finding * * *
>
> As it is, we think we must not infer such an implied finding nor contrive an express one of our own. * * * We must obey a Supreme Court decision."

The Court of Appeals therefore reversed and remanded the case "for the purpose of permitting the judge, if he believes the evidence so warrants, to make a further finding relative to the issue of good faith."

2. *Miller v. Commissioner*, 6 Cir., 1950, 183 F.2d 247:

The facts of this case were that petitioners, who were husband and wife and partners in a business, set up two trusts for each of their minor children, with petitioners as

trustees of all the trusts. Under the trust agreements, the trustees had full power to use the corpus and income of the trusts in the partnership's business. They also had the right to pay themselves whatever compensation, as trustees, they saw fit, up to the annual income of the trusts. Accumulation of income was mandatory for the life of the trust and the trust could not terminate until after the death of the grantor-trustees. The Tax Court held the trusts were not valid partners for tax purposes and taxed to petitioners all of the income of the trusts from the partnership. The Tax Court made no finding as to whether there was any real intention to make the trusts partners in the business. The Court of Appeals held (p. 255) that, "in the absence of findings on this proposition, it will be necessary to remand the case as in Culbertson v. Commissioner, supra, for a decision as to whether there was an intent to transfer the interests to the children or whether the arrangement merely multiplied, in form, a single economic unit without effecting a change in economic status." Accordingly the court remanded the case for a finding of fact on this issue.

3. *Harris v. Commissioner*, 9 Cir., 1949, 175 F.2d 444:

This was a review of a decision of the Tax Court holding that where a husband and wife, doing business as copartners, gave an undivided one-sixteenth interest in the business to each of their two children and neither child contributed any capital originating with himself and performed no services in the business, the children did not thereby become copartners. The case was on review before the Court of Appeals at the time of this court's decision in the *Culbertson* case. The Court of Appeals reversed the Tax Court's decision and remanded the case for further proceedings in conformity with this Court's opinion in the *Culbertson* case.

4. *Decisions of Court of Appeals for Fifth Circuit.*

The situation in the last cited case was likewise present in the following cases which were pending before the Court of Appeals for the Fifth Circuit at the time of this court's decision in the *Culbertson* case. *Bodden v. Commissioner*, 1950, 182 F.2d 624; *Tomlinson v. Commissioner*, 1950, 182 F.2d 938; *Seabrook v. Commissioner*, 1949, 176 F.2d 605.

The opinion of the court below completely ignores all of these cases decided by the Courts of Appeal of four other circuits and, without any finding of fact whatever as to the parties' good faith intent, decides that the trusts were not valid subpartners or joint venturers for tax purposes. Obviously this decision is in direct conflict with the aforesaid decisions by other Courts of Appeal.

C.

The holding of the Court of Appeals that the question of whether the grantor retained complete dominion and control over the corpus of the trusts is a question of fact is in direct conflict with the decisions of other Courts of Appeal.

The opinion states (R. 219):

> "It is contended that there was no substantial evidence upon which the Tax Court could hold that petitioners retained complete dominion and control over the corpus of the trusts and that they amounted to nothing more than assignments of petitioners' future earnings. An analysis of the facts attendant upon the creation, execution, and operation of the trusts, together with a consideration of the terms contained in the trust instruments, leads to the conclusion that there was substantial evidence supporting the Tax Court's decision and it must be affirmed on appeal. Rule 52 (a) Federal Rules of Civil Procedure."

The contention of petitioners dealt with in the foregoing statement was an alternative one to petitioners' contention that under the decision of the Eighth Circuit Court of Appeals in *United States v. Pierce*, 1943, 137 F.2d 428, the Tax Court's holding that petitioners retained complete dominion and control over the corpus of the trusts and that the trusts amounted to nothing more than assignments of petitioners' future earnings is a conclusion of law, and being a conclusion of law, is required to be supported by adequate findings of fact. By its application of Rule 52(a) of the Federal Rules of Civil Procedure to this holding of the Tax Court, the court below decided that said holding is a finding of fact. This decision is squarely in conflict with the decision of the Third Circuit Court of Appeals in *Brown v. Commissioner*, 1942, 131 F.2d 640, 641-642, and the decisions of the Tenth Circuit Court of Appeals in *Armstrong v. Commissioner*, 1944, 143 F.2d 700, 701, and *Hall v. Commissioner*, 1945, 150 F.2d 304, 306, each holding that the question of whether a taxpayer retained sufficient control over the trust property to make him the owner thereof for tax purposes under Section 22(a) of the Internal Revenue Code is a question of law rather than of fact.

The decision of the court below on this point is also in direct conflict with the decision of the Sixth Circuit Court of Appeals in *United States v. Anderson*, 1942, 132 F.2d 98, 99, that the question of ownership of the corpus of a trust and the income therefrom is either a question of law or a mixed question of law and fact.

III.

The Court of Appeals has erroneously so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the court below, in making findings of fact and adjudicating an issue not decided by the Tax Court, has exceeded its power as an appellate court.

A.

The Court of Appeals made findings of fact which, as an appellate court, it had no power to make.

In support of its holding that the grantors were the owners of the trust property, the court below quoted (R. 219) portions of a letter dated May 23, 1942, from J. W. Boyt to his counsel (Petitioners' Ex. 10, R. 111) and stated (R. 220):

> "The letter is indicative of petitioners' intent not to part with control over the partnership assets granted in the trusts."

The portions so quoted read as follows:

> "We are seriously considering dividing up our interests in the Partnership by giving outright, part of our interest to other members of our family, as a gift, in order to keep our income this year, individually, within reasonable tax limits.
>
> * * * We presume a trust would have to be formed to take care of the interests of the children.
>
> We understand this could be done without the recipients of such a gift having any voice in the partnership. Also that such a procedure would stick and would not jeopardize our present partnership into being construed as an association or corporation."

Since the Tax Court did not mention this letter in either its findings of fact or its opinion, it is reasonable to assume that it gave no consideration to the same. Nor did it find as a fact that the petitioners did or did not intend to part with the control over the partnership assets granted in the trusts. Had the Tax Court considered the letter as evidence bearing on such intent, it could have reasonably found as a fact from the letter's statement: "We are seriously considering dividing up our interest in the partnership by giving outright part of our interests to other members of our family as a gift," that the petitioners did intend to part with control over the partnership assets granted in the trust. From the writer's use of the word "outright" the Tax Court could have readily inferred that petitioners intended the gifts to be complete without any restrictions of ownership in favor of the grantors. On the other hand, if the statement of the letter aforesaid is susceptible of a different interpretation, it was for the Tax Court to find as a fact what was petitioners' true intent.

The Tax Court's failure to make any finding of fact, one way or the other, on the question of petitioners' intent as shown by said letter did not authorize the Court of Appeals to make such finding. This court has expressly held that the determination of the intent with which a person acted is for the trier of fact. *Commissioner v. Culbertson*, 1949, 337 U.S. 733, 743, 69 S.Ct. 1210, 93 L.Ed. 1659; *Commissioner v. Tower*, 1946, 327 U.S. 280, 287, 66 S.Ct. 532, 90 L.Ed. 670.

The Court of Appeals also found as a fact that "' * * the Boyt Partnership itself, as general partner in the Limited Partnership, could receive no profits from that enterprise unless Herrick consented to a distribution," and that Herrick testified that there were no withdrawals of such profits. (R. 221) The Tax Court did not mention any of these matters in either its findings of fact or its opinion, and there-

fore necessarily made no finding of fact regarding the same.

This court has repeatedly held that a Court of Appeals, being an appellate court only, has no power to make findings of fact and that fact issues in federal tax cases are for the Tax Court to decide in cases brought before it. *Spiegel's Estate v. Commissioner*, 1949, 335 U.S. 701, 706, 69 S.Ct. 301, 93 L.Ed. 330; *Commissioner v. Scottish American Investment Company, Ltd.*, 1944, 323 U.S. 119, 124, 65 S.Ct. 169, 89 L.Ed. 113; *Helvering v. Rankin*, 1935, 295 U.S. 123, 131, 55 S.Ct. 732, 79 L.Ed. 1343.

B.

The Court of Appeals exceeded its power as an appellate court by adjudicating an issue not decided by the Tax Court.

The Tax Court, in deciding that the income of the trusts from the Boyt Partnership was taxable to the petitioners, assumed that the petitioners conceded that the trusts were neither subpartners nor joint venturers with the actual partners of that partnership within the meaning of Section 3797(a)(2) of the Internal Revenue Code. This is clear from the court's statements in its opinion that, "* * * petitioners take the position that the trusts were not subpartners with the grantors and as such entitled to a division of the income share of the grantor-partner of Boyt Partnership," (R. 186-187) and that, "Here the trusts are admittedly neither partners nor even subpartners or joint venturers with the actual partners of Boyt Partnership." (R. 187) It therefore held the cases of *Rupple v. Kuhl*, 7 Cir., 1949, 177 F.2d 823, and *Klein v. Commissioner*, 1952, 18 T.C. 804, not applicable to such issue. (R. 187)

The record filed herein reveals no basis whatever for the aforesaid assumption by the Tax Court. Such record includes all the evidence in any way pertaining to the issue

of whether the trusts should be recognized for income tax purposes. It also contains the remarks of counsel on that issue made during the taking of such evidence. Nowhere in such printed record is there to be found any statement that the petitioners conceded that the trusts were neither subpartners nor joint venturers with the actual partners of the Boyt Partnership.

Thus it appears without dispute in the record that the Tax Court, because of its erroneous assumption that the trusts were neither subpartners nor joint venturers with the actual partners of the Boyt Partnership, never decided the issue of whether the trusts were such subpartners or joint venturers and therefore separately taxable on their respective distributive shares of the income from said partnership.

On review before the Court of Appeals, petitioners in their brief pointed out that the aforesaid assumption was erroneous, and called attention to the record evidence and decisions of the Supreme Court of Iowa showing that a valid subpartnership or joint venture existed under the law of Iowa. Petitioners also set out the evidence from which the Tax Court could have found a bona fide intent of the parties that would have made such subpartnership or joint venture valid for tax purposes. Because of the Tax Court's failure to determine this issue of whether the trusts were subpartners or joint venturers within the meaning of said Section 3797(a)(2), petitioners urged the Court of Appeals to reverse and remand the case for the purpose of having such determination made.

The Court of Appeals, in arriving at its decision repeatedly expressed (R. 218, 219, 222, 223) reliance on the rule laid down by this court in *Commissioner v. Culbertson*, 1949, 337 U.S. 733, 69 S.Ct. 1210, 93 L.Ed. 1659. In addition, the court below expressly stated (R. 222):

"But whatever the status attributed to the trusts in relation to their grantors, whether a subpartnership or a joint venture, it is now well settled that the term 'partnership' as defined in Section 3797(a)(2) of the Internal Revenue Code includes both a subpartnership and a joint venture. *Forman v. Commissioner*, 9 Cir., 1952, 199 F.2d 881; *U.S. v. Atkins*, 5 Cir., 1951, 191 F.2d 146; *Rupple v. Kuhl*, 7 Cir., 1949, 177 F.2d 823. And the same principles for determining the validity of a partnership, as laid down in the *Culbertson* case, supra, apply in determining the validity of a subpartnership or joint venture. *U.S. v. Atkins*, supra; *Stoffield v. Commissioner*, 7 Cir., 1953, 203 F.2d 667."

The reliance by the Court of Appeals on the *Culbertson* case together with its statement quoted above clearly shows that the court below was definitely of the opinion that no admission that the trusts were neither subpartners nor joint venturers had been made, and that an adjudication of this issue was essential to a determination of petitioners' liability for the income taxes in controversy. It did not, however, remand the case to the Tax Court for a decision by it on such issue, but instead made its own adjudication of the same. The effect of this action was to deny petitioners their day in court on said issue. See *Lutcher & Moore Lumber Co. v. Knight*, 1910, 217 U.S. 257, 267, 30 S.Ct. 505, 54 L.Ed. 757.

Petitioners submit that the Court of Appeals, having made findings of fact and having adjudicated an issue not decided by the Tax Court, exceeded its powers as an appellate court and thereby so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writs of certiorari should be granted.

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April, 1954.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The decision of the Court of Appeals is in error in holding that the trusts were not valid subpartners or joint venturers in the Boyt Partnership for tax purposes, in the absence of a finding of fact by the Tax Court as to whether the parties had a bona fide intent that petitioners and the trusts join together as subpartners or joint venturers in the conduct of that enterprise.

II.

The decision of the Court of Appeals is in error in holding that the Tax Court's holding that the grantors of the trusts were the owners of the trust property for Federal income tax purposes is a finding of fact rather than a conclusion of law.

III.

The Tax Court's decision that grantors of the trusts were the owners of the trust property for tax purposes being a conclusion of law, the Court of Appeals erred in holding that the Tax Court's findings of fact were adequate to support such decision.

A.

The Tax Court made no findings of fact as to the circumstances attendant on the operation of the trusts although

there was ample evidence in the record from which such findings could have been made.

B.

The Tax Court made no finding of any fact attendant on the creation of the trusts which supports its decision, and the Court of Appeals was without the power to supply such a finding by finding as a fact, as it did, that petitioners had an intent not to part with control over the trust property.

C.

The terms of the trust instruments, as found by the Tax Court, did not vest petitioners with sufficient control over the trust property to sustain its conclusion that petitioners were the owners of the trust property, and the decision of the Court of Appeals is in error in holding otherwise.

ARGUMENT.

I.

The decision of the Court of Appeals is in error in holding that the trusts were not valid subpartners or joint venturers in the Boyt Partnership for tax purposes, in the absence of a finding of fact by the Tax Court as to whether the parties had a bona fide intent that petitioners and the trusts join together as subpartners or joint venturers in the conduct of that enterprise.

The relationship of subpartnership is clearly established in Iowa by the decision of its Supreme Court in the leading case of *Henry v. Evans*, 1895, 95 Iowa 244, 63 N.W. 687. In *Replogel, v. Neff*, 1936, 176 Okla. 333, 55 P.2d 436, 439, which

cited this Iowa case, the Supreme Court of Oklahoma gave a common law definition of subpartnership saying:

> "The matter of one main partnership having as one of its members another lesser partnership is already established herein. Kindred to this idea is what is known in the law books as a 'subpartnership,' or a 'subpartner,' the essence of which is that A, B and C may constitute the main partnership, having each one-third interest. C may make a private and secret arrangement with D to the effect that, for certain consideration, D is to have a certain fractional part of C's one-third interest in the main partnership. This constitutes a subpartnership. It constitutes D a subpartner to the original partnership."

The relationship of joint venture in Iowa was clearly recognized and defined by the Supreme Court of Iowa in *Johanik v. Des Moines Drug Co.*, 1945, 235 Iowa 679, 17 N.W. 2d 385, 389, and *Nelson v. Lindsey*, 1917, 179 Iowa 862, 162 N. W. 3. The latter decision holds that under the law of Iowa a joint venture is valid notwithstanding the existence of the following three facts: (1) that the undertaking was a continuous business and not a single project or enterprise, (2) that one of the joint venturers did not have the right to participate in the management of the enterprise and (3) that one of the joint venturers was not directly liable to the creditors of the business.

In the instant case there was ample evidence that the Tax Court could have found that the trusts in the present case were subpartners with the actual partners of the Boyt Partnership under the law of the State of Iowa. Throughout the declarations of trust the relationship is described as one of sub-partnership. (Ex. 9, R. 80) Every ledger page which was set up on the Boyt Partnership's books for the capital account and drawing account of each trust describes the interest with the word "Sub-Partner." (Petitioners' Ex.

15, R. 96-102, 153-171) Still further evidence of such relation is the fact that even two years after the creation of the trusts, all the original partners in the Boyt Partnership signed a formal agreement in which they described the trusts as "sub-partner trusts." (Respondent's Ex. A, R. 108, 110)

There was ample evidence from which the Tax Court could have also found that the trusts were joint venturers with the actual partners of the Boyt Partnership as broadly defined by the Iowa law. Following the creation of the trusts the partners in that firm executed a Notice of Amendment to Articles of Partnership (Petitioners' Ex. 11, R. 113, 89) wherein they expressly recognized the reduced capital interests of the grantor-partners and the new capital interests of the trusts. The arrangement created by this amendment and the provisions of the original partnership agreement clearly constituted under the Iowa law a valid joint venture to which some of the parties contributed services and capital and to which other parties such as the trusts and Elizabeth M. Boyt and Barbadina Boyt contributed only capital.

While the Tax Court made no findings of fact as to whether capital was a material factor in the production of Boyt Partnership income, the evidence is without contradiction in the record that such was the case. J. W. Boyt testified as to that firm's need for working capital because of the rapid expansion of the business. (R. 91) The audit of the Boyt Partnership (Petitioners' Ex. 13, R. 129, 90) shows that on the date of the creation of the trusts that firm had a net worth of $437,497.20, of which $417,750.93 was invested in the limited partnership. On this same date that latter firm owed Herrick only $49,500.00 on notes. (Petitioners' Ex. 14, R. 143, 90)

Moreover, the record shows that the income of the Boyt Partnership was divided as follows: salaries were first paid

to the active partners in full compensation for their services, (Petitioners' Ex. 12, R. 121, Petitioners' Ex. 13, R. 133, 90; Petitioners' Ex. 15, R. 101, 96) and the remaining income constituted net income. By the terms of notice of amendment to the Articles of Partnership, (Petitioners' Ex. 11, R. 113, 115, 118) this net income was to be divided among the owners of the Boyt Partnership capital in accordance with the percentages therein specified to be received by the respective partners and trusts, thereby demonstrating that the share of said firm's capital owned by each trust produced its share of the net income.

In dealing with the status to be attributed to the trusts in relation to the grantors, as being either a subpartnership or joint venture, the Court of Appeals said (R. 222):

> ". . . it is now well settled that the term 'partnership' as defined in Section 3797 (a) (2) of the Internal Revenue Code includes both a subpartnership and a joint venture. *Forman v. Commissioner*, 9 Cir., 1952, 199 F. 2d 881; *U.S. v. Atkins*, 5 Cir., 1951, 191 F.2d 146; *Rupple v. Kuhl*, 7 Cir., 1949, 177 F.2d 823, and the same principles for determining the validity of a partnership, as laid down in the *Culberston* case, supra, apply in determining the validity of a subpartnership or joint venture. *U.S. v. Atkins*, supra; *Stoffield v. Commissioner*, 7 Cir., 1953, 203 F.2d 667."

The court went on to hold that notwithstanding a valid subpartnership or joint venture may have been created under the local law of Iowa (R. 222), such subpartnership or joint venture was not valid for federal income tax purposes because the trusts contributed nothing to the Boyt Partnership enterprise.

The court below, though twice professing (R. 219, 222) adherence to the rule of *Commissioner v. Culbertson*, 1949, 337 U.S. 733, 69 S.Ct. 1210, 93 L.Ed. 1659, as its guide in reaching its decision in the instant case, did not view the

question before it as one concerning the bona fide intent of the parties to join together as subpartners or joint venturers as required by such rule. Not once in its opinion is there even what this court in the *Culbertson* case (337 U.S. 743) termed, "an oblique reference to any lack of intent" on the part of the petitioners and trusts to combine their capital for the purpose of carrying on the business. Instead the opinion is replete (R. 222, 223) with statements that the trusts contributed no capital to the enterprise. These were substantially the same statements which this court in *Commissioner v. Culbertson*, supra, at page 744, held were inadequate to invalidate the partnership in that case.

The essence of the rule laid down by this court in the *Culbertson* case is that a court, before it can hold a family partnership invalid for the purposes, must find, as a fact, whether the parties had a bona fide intent to join together as partners (337 U.S. 742, 743), and that without such a finding in the record on review before an appellate court, the latter must reverse the decision and remand the case to the Tax Court so that such a finding may be made by that court. (337 U.S. 748) Except for the decision of the court below in the present case, Courts of Appeal have uniformly followed such mandate of this court in the *Culbertson* case. *Dyer v. Commissioner*, 2 Cir., March 9, 1954, 54-1 USTC, Par. 9280; *Miller v. Commissioner*, 6 Cir., 1950, 183 F.2d 246; *Harris v. Commissioner*, 9 Cir., 1949, 175 F.2d 444; *Bodden v. Commissioner*, 5 Cir., 1950, 182 F.2d 624; *Tomlinson v. Commissioner*, 5 Cir., 1950, 182 F.2d 938; *Seabrook v. Commissioner*, 5 Cir., 1949, 176 F.2d 605.

In the present case, the Tax Court, because it erroneously assumed that petitioners had conceded that the trusts were neither subpartners nor joint venturers with the petitioners in the Boyt Partnership, made no finding as to whether the parties had a bona fide intent that the trusts should be subpartners or joint venturers in the conduct of

said enterprise. In the absence of such a finding the Court of Appeals could not determine the case under the *Culbertson* rule as it professed to do but was required to reverse the Tax Court's decision and remand the case for a finding in conformity with this Court's opinion in that case. Its failure to follow this procedure is an obvious and flagrant error warranting a review and reversal of its decision by this court.

II.

The decision of the Court of Appeals is in error in holding that the Tax Court's holding that the grantors of the trusts were the owners of the trust property for Federal income tax purposes is a finding of fact rather than a conclusion of law.

The Tax Court, in the last paragraph of its opinion (R. 187) held that petitioners retained complete dominion and control over the corpus of the trusts and that they amounted to nothing more than assignments of petitioners' future earnings. This was tantamount to holding petitioners remained the owners of the trust property. The Court of Appeals in testing the sufficiency of this holding under Rule 52 (a) Federal Rules of Civil Procedure by ascertaining whether there was substantial evidence to support the same, treated such holding as a finding of fact rather than a conclusion of law. This determination is directly contrary to a prior decision of the Court of Appeals of the Eighth Circuit in the case of *United States v. Pierce*, 1943, 137 F. 428, which affirmed a decision of the district court wherein one of the conclusions of law was that "plaintiff has no dominion or control over the corpus or income of said trust." (51 F. Supp. 126, 128) The Court of Appeals in that case said (431):

". . . The ultimate question of whether a settlor remains the owner of the trust estate so that its income for any given year must be attributed to him is a question of law, a legal conclusion to be drawn from all the relevant facts and circumstances present in a given case. The answer to the question for decision here depends upon an analysis of the terms of the particular trust involved and the circumstances attendant on its creation and operation. McKnight v. Commissioner, 8 Cir., 123 F.2d 240; United States v. Anderson, 6 Cir., 132 F. 2d 98; Helvering v. Bok, 3 Cir., 132 F.2d 365."

Squarely in accord with the foregoing holding in the *Pierce* case are the following decisions of the Court of Appeals of other circuits, *Armstrong v. Commissioner*, 10 Cir., 1944, 143 F.2d 700, 701; *United States v. Anderson*, 6 Cir., 1942, 132 F.2d 98, 99; *Brown v. Commissioner*, 3 Cir., 1942, 131 F.2d 640, 641.

In *Spiegel's Estate v. Commissioner*, 1949, 335 U.S. 701, 706, 69 S.Ct. 301, 93 L.Ed. 330, this court held that the determination of such an issue as ownership may involve many questions of fact and that "these fact issues in federal tax cases are for the Tax Court to decide in cases brought before it."

Petitioners submit that the decision of the court below on this particular point is clearly in error as being directly contrary to the decision of this court in *Spiegel's Estate v. Commissioner*, supra, and the aforesaid decisions of the Courts of Appeal including the earlier decision of the court below in the *Pierce* case.

III.

The Tax Court's decision that grantors of the trusts were the owners of the trust property for tax purposes being a conclusion of law, the Court of Appeals erred in holding that the Tax Court's findings of fact were adequate to support such decision.

Under the decisions of the various Courts of Appeal cited in the last preceding division of this brief, the Tax Court's holding in substance that the grantors remained the owners of the trust property for tax purposes is a conclusion of law. Being a conclusion of law, it must be supported by findings of fact adequate to support such conclusion and failure of the Tax Court to make such findings is error requiring a reversal of its decision and a remand of the case. *Helvering v. Rankin*, 1935, 295 U.S. 123, 55 S.Ct. 732, 79 L.Ed. 1343; *Bartholomew v. Commissioner*, 8 Cir., 1951, 186 F.2d 315; *Helvering v. Ward*, 8 Cir., 1935, 79 F.2d 381, 382; *Miller v. Commissioner*, 6 Cir., 1950, 183 F.2d 247, 255.

Only upon findings of fact made from an analysis of the terms of the trust and all the circumstances attendant on its creation and operation can the Tax Court conclude who is the owner of trust property so as to be taxable on the income therefrom under Section 22(a) of the Internal Revenue Code. *Helvering v. Clifford*, 1940, 309 U.S. 331, 335, 60 S.Ct. 554, 84 L.Ed. 788, 791; *United States v. Pierce*, 8 Cir., 1943, 137 F.2d 428, 431. Petitioners submit that the Tax Court's findings of fact regarding these essential factual matters in the instant case are wholly inadequate to sustain its legal conclusion that the petitioners were the owners of the trust property, and therefore the decision of the Court of Appeals holding otherwise (R. 223), is clearly in error.

In support of this proposition petitioners will make the contentions set forth in Subdivisions A, B and C hereof.

A.

The Tax Court made no findings of fact as to the circumstances attendant on the operation of the trusts although there was ample evidence in the record from which such findings could have been made.

Although there was plenty of evidence showing the circumstances attendant on the operation of the trusts, the Tax Court failed to make any finding in that regard. For example, the Tax Court made no finding regarding the disposition of the income from the trust property and the uses to which it was put. Yet Petitioners' Exhibit 15, being certain ledger pages from the books of account of the Boyt Partnership (R. 96), reveals that the share of that firm's income to which each trust was entitled by reason of its ownership of a part of the partnership's capital was not paid to or credited to the account of the grantors but was paid directly to the trusts by credits to their capital accounts on the firm's books. (R. 96, 99, 100, 163-171) The separate interests of the several trusts in the partnership's annual earnings were also reflected by the firm's 1943 return filed with the State of Iowa. (Petitioners' Ex. 12, R. 119, 125, 89) Moreover, the drawing accounts of the trusts do not show any withdrawals to the grantors or for their benefit, but on the contrary, disclose that the withdrawals which were made by the trusts were for the purpose of investing in government bonds and corporation stock, paying life insurance premiums and taking care of state and federal income taxes owed by the trusts. (Petitioners' Ex. 15, R. 96, 99, 100, 163-171)

In addition to the foregoing evidence there was also the

uncontradicted testimony of A. J. Boyt that since the creation of the trusts, "The trustees have not used the income of any of these trusts for payment of their own legal obligations. We have not used any of the funds for our own benefit." (R. 94)

The Court of Appeals, not having before it any finding of fact by the Tax Court relative to the operation of the trusts, proceeded to supply this deficiency in the record by finding first that the Boyt Partnership could receive no profits from the Limited Partnership unless Herrick consented to a distribution (R. 221), and second, that Herrick testified that there were no withdrawals of such profits. (R. 221) As pointed out in the petition for writs of certiorari (p. 29-30), these were findings of fact which the Court of Appeals, being an appellate court, lacked the power to make.

Assuming, however, for the sake of argument, that such findings were validly made, petitioners submit that facts so found, i.e., that no withdrawals by the Boyt Partnership of its share of the profits of the limited partnership could be made without the consent of Herrick and that no such withdrawals were made, do not establish that petitioners had control and dominion over the income from the trust property. Herrick was a stranger to the Boyts (R. 87) and had nothing to do with the trusts. (R. 107) The power which he had to veto disbursements of Limited Partnership profits to the Boyt Partnership was no different from the standpoint of the trusts than it was from the standpoint of the other persons, including petitioners, who, like the trusts, owned interests in the Boyt Partnership.

Moreover, such veto power was by no means as absolute as the opinion of the court below implies. The Limited Partnership agreement (Ex. 1, R. 70) expressly provided that said partnership should terminate on November 4, 1943, which was within the principal tax year involved in this case. Accordingly, after that date Herrick was powerless

to prevent the Boyt Partnership from withdrawing its share of the limited partnership's net income. Thus it appears that Herrick's control over said share was limited solely to distribution thereof prior to November 4, 1943. Certainly by no stretch of the imagination can it be said that such a limited power by a stranger having no relation whatever to the trusts constitutes dominion and control by petitioners over the trust property.

The foregoing discussion serves to emphasize petitioners' contention, now being considered, that the inferences to be drawn from these various evidentiary matters pertaining to the operation of the trusts should have been drawn by the Tax Court and embodied in a finding of fact. Inasmuch as this was not done, the Tax Court's findings of facts are inadequate to support its decision that the petitioners remained the owners of the trust property for tax purposes.

B.

The Tax Court made no finding of any fact attendant on the creation of the trusts which supports its decision, and the Court of Appeals was without the power to supply such a finding by finding as a fact, as it did, that petitioners had an intent not to part with control over the trust property.

The only facts attendant on the creation of the trust found by the Tax Court, aside from the fact that the trust declarations were executed, were as follows: (1) That "Under date of June 1, 1942, the partners of the Boyt Partnership and a trustee of the various trusts executed a notice of amendment to the articles of partnership setting forth the percentage share of the net income of Boyt Partnership distributable to each partner and to each of the seventeen trusts, beginning June 1, 1942," and (2) that, "An audit was made of the books of account of the Boyt Partnership as of

May 31, 1942, and based thereon accounts were set up showing the percentage interest and the dollar share of the capital account of each trust." (R. 184)

It is obvious that the facts found in these findings do not support a conclusion that petitioners remained the owners of the percentage interests in the Boyt Partnership capital transferred to the trusts. Instead they establish just the contrary since they indicate that the parties actually carried out the provision of each trust instrument wherein the grantor directs the Boyt Partnership to segregate the interest therein transferred in trust and maintain book entries to show complete delivery thereof to the trustees. (Ex. 9, R. 81)

The Court of Appeals not only ignored the import of these meager findings by the Tax Court but also proceeded to make its own finding on a matter not dealt with by the Tax Court in either its findings of fact or opinion, i.e., whether the petitioners had an intent not to part with control of the trust property. In this finding it found that J. W. Boyt's letter of May 23, 1942, to his counsel is "indicative of petitioners' intent not to part with control over the partnership assets granted in the trusts." (R. 220)

In their petition for writs of certiorari petitioners have already pointed out that said letter was susceptible of an interpretation showing that petitioners did intend to part with control over the property placed in trust and that it was for the Tax Court, and not the Court of Appeals, to find what was petitioners' true intent in this regard. There was ample evidence from which the Tax Court could have made a finding on this fact issue. In addition to the foregoing letter, the Notice of Amendment to Articles of Partnership (Petitioners' Ex. 11, R. 113, 89), mentioned by the Tax Court in its findings of fact (R. 184), wherein all of the partners consented in writing, as of June 1, 1942, to creation of the trusts and to the reduction of the capital interests of the

grantors in the Boyt Partnership by the specific percentages thereof transferred to the respective trusts, shows an unmistakable intent on the part of each petitioner, as a signatory party to said instrument, to part with control over that part of his capital interest in said partnership placed by him in trust. The clear cut reference in the body of said amendment to the "change in the distributive share of the net income" of the partnership as compared to prior periods being "due to creation of certain trusts and changes made in *capital* interest" (italics supplied) proves that petitioners intended that capital, and not just a right to future income, should be transferred to the trusts.

C.

The terms of the trust instruments, as found by the Tax Court, did not vest petitioners with sufficient control over the trust property to sustain its conclusion that petitioners were the owners of the trust property, and the decision of the Court of Appeals is in error in holding otherwise.

The Court of Appeals held that the Tax Court did not err in taxing petitioners on the income to the trusts because the trusts "were set up in such a manner as to leave the grantors the substantial owners of the trust property and the income therefrom." (R. 223) The manner in which the trusts were set up is described earlier in the opinion's summary of the provisions of each trust. (R. 220) Except for its reference to the exculpation clause and the provision forbidding the beneficiary's alienation of the trust estate and its omission of the provisions prohibiting the use of income on account of any legal obligation of the beneficiary's parents and directing the Boyt Partnership to segregate the interest transferred in trust and maintain book entries to show complete delivery thereof, this summary

is the same as that made by the Tax Court (R. 183) in its findings of fact.

An examination of the terms of the instrument creating each trust referred to by the Tax Court and the Court of Appeals discloses that only two rights were retained by each petitioner as the grantor of such trust. One is the right of reversion on the death of all grantor's children without issue as provided in paragraph X. (Ex. 9, R. 82, 83) That such a right, over which the grantor has no control, is not a right which has the legal effect of making him the owner of the trust property for tax purposes is well established by the following decisions: *Helvering v. Wood*, 1940, 309 U. S. 344, 347, 348, 60 S.Ct. 551, 84 L.Ed. 796; *Preston's Estate v. Commissioner*, 2 Cir., 1951, 187 F.2d 531, 532; *Suhr v. Commissioner*, 6 Cir., 1942, 126 F.2d 283, 286.

The other right retained by each petitioner as grantor was the right to purchase the interest of the beneficiary "in said partnership at the value of such interest as shown by the last preceding audit of said partnership." (Ex. 9, R. 83) Under the applicable Treasury Regulations (Reg. 111, Sec. 29.22(a) 21(e)(1)) this right is of no significance as indicating ownership in the grantor unless it be assumed that "value" arrived at by such audit would differ materially from "adequate and full consideration" within the meaning of said regulations. This assumption is wholly unsupported by any finding of fact by the Tax Court and is contrary to the evidence. The record shows that the grantors in setting up the trusts intended that a complete inventory and audit should be made as of May 30, 1942, "so as to have a true measure of value as of that date for the interests we have in the partnership." (Petitioners' Ex. 10, R. 111, 88-89) That such intent was carried out is shown by the fact that a complete inventory and audit of the assets of the Boyt Partnership was made as of May 31, 1942. (Petitioners' Ex. 13, R. 127-139) This audit reveals that on that date the assets

of said firm consisted mainly of cash, receivables and current inventories amounting to $574,503.95. The very nature of these items is such as to make their "book value" the same as "actual value." The only remaining assets shown on said audit consist of a small equity in real estate valued at $2,754.37 and machinery and equipment valued at $10,084.57. In view of petitioners' intention aforesaid, these valuations represented the true measure of the value of those items.

With such good faith attendant on the creation of the trusts and the making of the initial audit, the only reasonable conclusion is that future audits, which were to be made semi-annually (Ex. 8, R. 78), would be prepared on the same basis. Furthermore, petitioners were but four of eleven partners, some of whom created no trusts. It is unreasonable to assume that the latter would consent to an audit containing values other than actual values for to do so would be contrary to their own best economic interests. Moreover, the life of the Boyt Partnership was by the terms of Exhibit 8 (R. 77) to expire on August 30, 1944, and the repurchase clause would have no application subsequent to such termination. By reason of the nature of the assets of the Boyt Partnership and the fact that fictitious and arbitrary values would be adverse to the economic interest of all eleven partners and because the preparation of the audits was not under the exclusive control of petitioners, the audits would reflect the true value of the assets of the partnership. The instant case is comparable to the situation in *Palmer v. Commissioner*, 1939, 40 BTA 1002, 1008, wherein the Tax Court held grantor's right to reacquire the trust property by purchase at a fair price, to be fixed by a specified formula (in which book value was a major factor) over which grantor had no control, did not make grantor taxable on the income from the trust property. This decision was

affirmed, 2 Cir., 1940, 115 F.2d 368, after the decision of this Court in the *Clifford* case.

Except for this power to repurchase, the only other powers provided for in each trust declaration were given to the trustees, who were two in number, consisting initially of the grantor and his wife. They were the power to accumulate income and the power to manage the trust property. Each declaration provided that, "If said trustees are only two in number, they must act unanimously; if more than two, by majority vote." (Ex. 9, R. 81)

The power of the trustees to accumulate income in the present case was not a device by which the grantor of a trust could by his own act shift the interest of one beneficiary to another either in whole or in part. The only event which, by the terms of each trust instrument, could shift the beneficial interest in the trust property from one beneficiary to another was an act of God, namely, the death of the primary beneficiary. Neither the grantor nor the trustee could terminate the trust. The trust period was relatively a short period of time for one-half of the trust property was required to be distributed to the primary beneficiary upon his reaching the age of 25 provided he requested the same, and when the primary beneficiary attained the age of 35 the trust terminated and distribution to the primary beneficiary was mandatory. Here, where the trust period of each of the trusts was to end in all events upon the attainment of age 35 by the primary beneficiary, the retention of a power in the trustees to accumulate income was but the usual and customary provision of a trust set up by a prudent father for his child. The Courts of Appeal have repeatedly held that such a power does not bring the case within the rule announced by this court in *Helvering v. Clifford*, 1940, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788, so as to make the grantor of the trust the owner of the trust property for tax purposes. *Cushman v. Commissioner*, 2 Cir., 1946, 153 F.2d 510; *Com-*

missioner v. Katz, 7 Cir., 1943, 139 F.2d 107, 108, 110; *Hall v. Commissioner*, 10 Cir., 1945, 150 F.2d 304, 307, 166 A.L.R. 1302. The Tax Court has held likewise in numerous decisions. *Fisher v. Commissioner*, 1950, 14 T.C. 792, Ac. 1950-2 Cum. Bul. 2; *Loew v. Commissioner*, 1946, 7 T.C. 363, 368; *Myer v. Commissioner*, 1946, 6 T.C. 77, 82, 83; *Leonard v. Commissioner*, 1945, 4 T.C. 1271, 1277, 1279, 1285; *Smith v. Commissioner*, 1945, 4 T.C. 573; *McCutchin v. Commissioner*, 1945, 4 T.C. 1242, 1245, 1252.

With respect to the management powers of the trustees the Tax Court in its findings of fact (R. 183) found "that the trustees shall have power to hold, accumulate, invest, sell or exchange the trust fund and its accumulations." These are merely the usual and ordinary powers customarily vested in trustees. Each of such powers was hedged about by all of the fiduciary limitations and restraints of Iowa law and, under the following decisions of the Supreme Court of Iowa could be exercised only in the interests of the beneficiaries. *In re Cool's Trusteeship*, 1930, 210 Ia. 30, 230 N.W. 353; *Keating v. Keating*, 1917, 182 Ia. 1056, 165 N.W. 74; *Linsley v. Strang*, 1910, 149 Ia. 690, 128 N.W. 932. These decisions on local law are determinative, for federal tax purposes, of the nature and extent of the interests created by the trust instruments. *Helvering v. Stuart*, 1942, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. 154; *United States v. Pierce*, 8 Cir., 1943, 137 F.2d 428, 431; *Cherry v. Commissioner*, 1944, 3 T.C. 1171, Ac. 1944 C. B. 5. In the case last cited, the Tax Court, in upholding the validity of an Iowa trust for income tax purposes, relied on the above Iowa decisions.

That usual and customary powers of management which can thus be exercised only in a fiduciary capacity for the beneficiary of a trust do not make the grantor-trustee the owner of the trust property is now well established by decisions of Courts of Appeal in the following cases. *Commis-*

sioner v. Branch, 1 Cir., 1940, 114 F.2d 985; *Cushman v. Commissioner*, 2 Cir., 1946, 153 F.2d 510, 514; *Jones v. Norris*, 10 Cir., 1941, 122 F.2d 6; *Maiatico v. Commissioner*, D.C. Cir., 1950, 183 F.2d 836. It is also well established by decisions of the Tax Court. *Cohen v. Commissioner*, 1950, 15 T.C. 261, 276; *Stern v. Commissioner*, 1950, 15 T.C. 521; *Black v. Commissioner*, 1945, 5 T.C. 759, 766-767.

Just as none of the above retained "powers", individually, prevented a complete transfer of the subject-matter of the gifts to the trusts in the present case, so the combination thereof likewise does not do so. *United States v. Morss*, 1 Cir., 1947, 159 F.2d 142; *Hall v. Commissioner*, supra.

In its summary of the provisions of each trust, the court below mentions Article II stating that no trustee, as such, shall participate in the management of the Boyt Partnership. (R. 220) Petitioners submit that this provision is without significance as showing ownership of the trust property in the petitioners for the two reasons now stated.

The first reason is that, under the decisions of the Supreme Court of Iowa a person may own an interest in a subpartnership (*Henry v. Evans*, 1895, 95 Ia. 244, 252, 63 N. W. 687, 689) or a joint venture (*Johanik v. Des Moines Drug Co.*, 1945, 235 Ia. 679, 17 N.W. 2d 385) without taking part in the management of the enterprise. The second reason is that the situation of each trust as a subpartner or joint venturer in the present case, is no different from the situation of the trust in each of the following cases in which it was held that its status as a limited partner was not invalidated for federal tax purposes because of the fact that the trustee of such trust had no right to participate in the management and control of the business. *Sultan v. Commissioner*, 1952, 18 T.C. 715, 723, affirmed March 10, 1954, 9 Cir., 54-1 USTC par. 9281; *Greenberger v. Commissioner*, 7 Cir., 1949, 177 F.2d 990, 993, 994; *Stern v. Commissioner*, 1950, 15 T.C. 521, 527.

The foregoing analysis of the terms of the trust instruments, in the light of the many court decisions hereinabove cited involving similar trust provisions, conclusively establishes that said terms did not vest petitioners with sufficient dominion and control over the trust property to warrant a court's holding that the petitioners were owners of the trust property so as to be taxable on the income therefrom. This being true, and, as pointed out earlier herein, the Tax Court having failed to find any facts attendant on the creation and operation of the trusts which would justify a contrary conclusion, petitioners submit that the findings of fact by the Tax Court are wholly inadequate to support its holding that petitioners were the owners of the trust property for tax purposes, and the decision of the Court of Appeals holding otherwise is clearly in error.

CONCLUSION.

For all of the reasons stated, petitioners submit that the writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutes and Regulations Involved.

INTERNAL REVENUE CODE:

Sec. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(26 U.S.C. 1946 ed., Sec. 22(a)).

Sec. 181. PARTNERSHIP NOT TAXABLE. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec 181).

Sec. 182. TAX OF PARTNERS. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

. . .

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1946 ed., Sec. 182).

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

• • •

(2) Partnership and partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such syndicate, pool, joint venture, or organization.

(26 U.S.C. 1946 ed., Sec. 3797(a)(2)).

TREASURY REGULATIONS:

Reg. 111, Sec. 29.22(a)-21. *Trust income taxable to the grantor as substantial owner thereof.*

• • •

(c) *Administrative control.*—Income of a trust, whatever its duration, is taxable to the grantor where, under the terms of the trust or the circumstances attendant on its operation, administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust. Administrative control is exercisable primarily for the benefit of the grantor where—

(1) a power exercisable by the grantor, or any person not having a substantial adverse interest in its exercise, or both, whether or not in the capacity of trustee, enables the grantor or any person to purchase, exchange or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate and full consideration in money or money's worth; • • •

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	9
Conclusion	13
Appendix	14

CITATIONS

Cases:

Burnet v. *Leininger*, 285 U. S. 136	10
Commissioner v. *Culbertson*, 337 U. S. 733	10
Feldman v. *Commissioner*, 186 F. 2d 87	11
Helvering v. *Clifford*, 309 U. S. 331	10
Helvering v. *Stuart*, 317 U. S. 154	11
Lucas v. *Earl*, 281 U. S. 111	10
Schallerer v. *Commissioner*, 203 F. 2d 100, certiorari denied, 345 U. S. 995	12

Statute:

Internal Revenue Code:

Sec. 22 (26 U. S. C. 1946 ed., Sec. 22)	14
Sec. 181 (26 U. S. C. 1946 ed., Sec. 181)	14
Sec. 182 (26 U. S. C. 1946 ed., Sec. 182)	14
Sec. 3797 (26 U. S. C. 1946 ed., Sec. 3797)	15

Miscellaneous:

Treasury Regulations 111:

Sec. 29.22(a)-1	15
Sec. 29.181-1	16
Sec. 29.182-1	16
Sec. 29.3797-4	16

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 743

J. W. BOYT, ESTATE OF PAUL A. BOYT, DECEASED, BY DOROTHY F. BOYT AND ROBERT G. RILEY, ADMINISTRATORS, AND B. B. QUINER AND EVA QUINER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 175-187) are reported at 18 T. C. 1057. The opinion of the Court of Appeals (R. 212-223) is reported at 209 F. 2d 839.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1954. (R. 224.) A petition

for rehearing, filed on February 19, 1954 (R. 225-233), was denied on March 3, 1954 (R. 235). The petition for a writ of certiorari was filed on May 1, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the courts below erred in holding that the distributive shares of certain trusts in the income of a partnership were taxable to the grantors of the trusts under Sections 22(a), 181 and 182 of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 14-17.

STATEMENT

The facts, as found by the Tax Court (R. 67-85, 177-184), may be summarized as follows:

The Boyt Harness Company, an Iowa Corporation (hereinafter sometimes referred to as the Boyt Corporation), was organized in the latter part of 1933 and, at its place of business in Des Moines, Iowa, engaged in manufacturing harness, leather goods and kindred lines for farm use, until dissolved in 1941 as hereinafter mentioned. A predecessor corporation owned by members of the Boyt family had engaged in a similar line of business from 1901 until January 1934 when its assets were sold by a receiver to a group consisting of the individual petitioners and the decedent whose estate is

a petitioner. This group transferred such assets to the newly organized Boyt Corporation and received stock in proportion to their respective cash contributions for the purchase of the assets. (R. 177.)

The stock of the Boyt Corporation so issued in 1934 in the names of J. W. Boyt, A. J. Boyt, and Paul A. Boyt (now deceased) was held by them on behalf of themselves and their wives, each of whom had made a substantial contribution to the venture. (R. 178.)

During 1940 the Boyt Corporation did not have sufficient working capital or credit to finance large Government contracts it desired, and it endeavored to interest Glen C. Herrick to that end, but he refused. However, Herrick proposed the formation of a limited partnership between the corporation and himself to engage solely in the business of manufacturing certain types of canvas and leather military equipment. (R. 178.)

On November 4, 1940, the Boyt Corporation as the general partner and Herrick as the limited partner entered into a limited partnership agreement, under the laws of Iowa, to conduct business at Des Moines, Iowa, under the firm name of Boyt Harness Company (hereinafter referred to as the Limited Partnership) to procure contracts with and manufacture products for the United States Government. Herrick agreed to contribute $500 as special capital, to procure the bidding and performance bonds, and to advance necessary funds for financing the contracts obtained, with such ad-

vances to be evidenced by the four per cent demand notes of the Limited Partnership. The Boyt Corporation agreed to contribute certain tools, equipment, machinery, etc., and also management. It was agreed that the Limited Partnership would purchase special dies, machinery and equipment; that it would pay the Boyt Corporation the actual cost of the manufacture of products contracted for, without allowance for the use of that company's machinery, equipment and premises or for salary to that company's officers; that it would not bid on work without Herrick's approval; and that its profits from completion of any contract would be divided between the general partner and the limited partner in the amounts of two-thirds and one-third, respectively, during the first year, and thereafter three-fourths and one-fourth, respectively. It was agreed that the limited partner would not be liable for any losses in excess of his special capital contribution, and, further, that the Limited Partnership's books of account, funds, and disbursements would be maintained under the control of an employee of that partnership designated by Herrick. The agreement remained in effect until terminated in December 1944, except as modified with respect to the identity of the general partner, as hereinafter mentioned. During its existence the Limited Partnership entered into and performed numerous contracts with several branches of the Armed Forces for production of various items made from canvas, leather, and webbing. (R. 178-179.)

Entirely separate and apart from the Limited Partnership enterprises, the Boyt Corporation continued to engage in the production of certain civilian goods and maintained its own books of account and bank account, until its dissolution as of August 30, 1941. (R. 179.)

During 1941 the stockholders of Boyt Corporation considered the dissolution of the company and the formation of a general partnership. Before any definite conclusion had been reached as to whether such a step could be carried out, in view of the limited partnership agreement, J. W. Boyt, A. J. Boyt, and Paul A. Boyt caused one-half of their respective shares in the Boyt Corporation to be issued to their wives. (R. 179-180.)

During the latter part of August 1941 and on advice of counsel, Herrick raised no question as to the proposed formation of a Boyt family general partnership, provided it would assume and carry out the obligations of the Boyt Corporation. (R. 180.)

On August 30, 1941, at a special meeting attended by all the stockholders of the Boyt Corporation, it was resolved that the corporation accept an offer to purchase its assets and assume its liabilities as of the close of business on August 30, 1941, as made by a partnership composed of those stockholders. (R. 180.)

On September 15, 1941, but as of August 30, 1941, the stockholders executed written articles of partnership under the firm name of Boyt Harness Company with principal place of business at

Des Moines, Iowa (hereinafter referred to as the Boyt Partnership) providing, *inter alia,* that the partnership capital should consist of all the assets of the Boyt Corporation and should be owned by the partners in stated proportions; that the partners should share in the profits and losses of the business in those proportions; that the partnership should take over all assets and accounts of the Boyt Corporation and assume all its debts, liabilities, and uncompleted contracts as they existed on August 30, 1941; and that upon dissolution of the partnership and payments of debts, the surplus should be divided among the partners in accordance with their interests therein. The parties to the articles of partnership thereby intended in good faith to become partners for the purpose of carrying on a business to which they each contributed capital and the profits and losses of which they agreed to share in certain proportions. (R. 180-181.)

The Boyt Corporation was dissolved on August 30, 1941, and the Boyt Partnership took over its assets and assumed its liabilities as of that date. The Boyt Partnership was substituted for the dissolved corporation as the general partner in the Limited Partnership and thereafter carried out the terms of the November 4, 1940, limited partnership agreement. The Boyt Partnership was recognized as the general partner in the Limited Partnership in Government contracts obtained in the name of the Limited Partnership. J. W. Boyt had been president of the Boyt Corporation and as such had managed the affairs of Limited Partnership. He became the managing partner of the Boyt

Partnership and as such continued as manager of the Limited Partnership. The Boyt Partnership continued the production of civilian goods as an independent venture. (R. 181.)

Under date of September 14, 1942, seven of the partners in the Boyt Partnership executed seventeen declarations of trust, identical in form. In each, the grantor and (with one exception) his spouse were trustees; the grantor's child was beneficiary; and the corpus of the trust consisted of a stated percentage interest in the Boyt Partnership. (R. 182-183.) Ten of these trusts (three executed by J. W. Boyt, three by A. J. Boyt, one by Paul A. Boyt, and three by B. B. Quiner) are involved in the instant proceeding.

The trust instrument in each instance provided (R. 183) that:

> I, * * * [grantor], owner of a * * * [designated] per cent interest in the Boyt Harness Company, a partnership * * *, do hereby acknowledge and declare that as of June 1, 1942 I have established an irrevocable trust for the benefit of my minor * * * [name of son or daughter], in a * * * [designated] per cent subpartnership (with myself) interest in said partnership taken from my said * * * per cent interest therein, upon the conditions and for the uses and purposes hereinafter set forth.

The trust instrument further provided, *inter alia,* that (R. 183):

> No trustee, as such, shall participate in the management of said partnership, it being my intention hereby to establish the relation of

subpartnership between myself and said trustees * * *.

The instrument also provided that the trustees should have power to hold, accumulate, invest, sell, or exchange the trust fund and its accumulations; that the grantor directed the Boyt Partnership to segregate the interest therein transferred in trust and maintain book entries to show complete delivery thereof to the trustees; that the trustees as they deemed proper should pay portions of the income to the use of the beneficiary, but not on account of any legal obligation of his parents; that the trustee should distribute one-half of the trust fund and accumulations to the beneficiary upon his written request after attaining 25 years of age, and distribute the remainder upon his attaining 35 years of age; that if the beneficiary should predecease the grantor without issue or surviving brother or sister, then the remaining portion of the trust estate should revert to the grantor and his spouse as joint tenants with right of survivorship; and that the grantor reserved the right to purchase the subpartnership interest at any time at the value thereof as shown by the last preceding audit of the Boyt Partnership. (R. 183-184.)

Under date of June 1, 1942, the partners of the Boyt Partnership and trustees of the various trusts executed a notice of amendment to the articles of partnership setting forth the percentage share of the net income of Boyt Partnership distributable to each partner and to each of the seventeen trusts, beginning June 1, 1942. (R. 184.)

An audit was made of the books of account of the Boyt Partnership as of May 31, 1942, and based thereon accounts were set up showing the percentage interest and dollar share of the capital account of each trust. The drawing account for each trust showed the percentage of interest and the dollar share of the partnership's net income. (R. 184.)

The Commissioner, determining deficiencies, refused to recognize the trusts for tax purposes, and taxed their allocated shares of the net income of the Boyt Partnerships to the grantors.[1] The Tax Court agreed, holding that the trusts "contributed nothing to the enterprise and [that] their creation merely provided a means whereby they became passive recipients of shares of income earned by the grantor-partners. Furthermore," the Tax Court concluded, "the grantors in their individual capacities * * * retained complete dominion and control over the corpus of the trusts," and thus "actually earned the income in question" (R. 187). The Court of Appeals affirmed. (R. 213-223.)

ARGUMENT

Both courts below agreed, after appraising the details of the subpartnership-trust arrangements involved in this case, that the grantors of the trusts actually continued to earn the Boyt Partnership

[1] The Commissioner also refused to recognize the wives of J. W. Boyt, A. J. Boyt, and Paul A. Boyt, as partners, and taxed their distributive shares of the net income of Boyt Partnership to the husbands (R. 182); but the Tax Court decided this point against the Commissioner (R. 185-186). The Commissioner acquiesced in the Tax Court's decision (1953-1 Cum. Bull. 3), and he took no appeal.

income they sought to siphon through and attribute to the trusts. Resting upon amply supported findings that the grantors retained substantially complete dominion over the trust funds and that the trusts served merely as "passive recipients of shares of income earned by the grantor-partners" (R. 187), this conclusion applies well-settled principles to the facts presented here. *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136; *Helvering* v. *Clifford,* 309 U. S. 331; *Commissioner* v. *Culbertson,* 337 U. S. 733. The result is clearly correct. Turning on the particular facts of this case, it presents no conflict and no other reason for review by this Court.

The avowed and dominant purpose of the grantors in creating trusts was to "keep [their] income this year, individually, within reasonable tax limits."[2] Cleaving to this design, the grantors remained in complete control of the property they formally assigned, and there was no significant

---

[2] The quoted language is from a letter dated May 23, 1942, written by J. A. Boyt to his lawyer (R. 111, 219-220). To quote it more fully, the letter stated:

> We are seriously considering dividing up our interests in the Partnership by giving outright part of our interests to other members of our family, as a gift, in order to keep our income this year, individually, within reasonable tax limits.
>
> For instance, the writer and his wife each have 17% of the Boyt Harness Company, and it is our intention to give part of our interest to each of our three children who are minors. We presume a trust would have to be formed to take care of the interests of the children.
>
> We understand this could be done without the recipients of such a gift having any voice in the partnership. Also, that such a procedure would stick and would not jeopardize our present partnership into being construed as an association or corporation.

change in their business relationships by virtue of the assignments. The Boyt Partnership, the income of which the taxpayers sought to subdivide into separate family shares for tax purposes, functioned without change. The trust instruments specifically provided that no trustee as such should participate in the management of the Boyt Partnership. (R. 80, 183.) With their spouses, the grantor-partners retained as trustees plenary powers over the interests they had placed in trust, and their individual roles as partners in the Boyt Partnership remained unaltered.[3] In short, after the creation of the trusts, as before, the grantors remained for all practical purposes the real owners of the interests in question; the record could have afforded no adequate basis for a contrary determination. Cf. *Feldman* v. *Commissioner,* 186 F. 2d 87 (C. A. 4th); *Schal-*

---

[3] Misconceiving the issue, petitioners invoke (Pet. 18-19) *Helvering* v. *Stuart,* 317 U.S. 154, for the proposition that state law determines the legal rights and interests created by their trust instruments. The courts below nowhere questioned this proposition. They held merely that the rights and interests in the trusts were legally and economically too unsubstantial to permit their recognition as separate entities for tax purposes. Thus, the Court of Appeals said (R. 222-223):

> As we have noted, petitioners retained beneficial ownership of the trust res for all practical purposes. Conversely, the trusts contributed nothing to the Boyt Partnership enterprise. This is true notwithstanding a valid subpartnership or joint venture may have been created under the local law of Iowa. *Commissioner* v. *Tower,* 327 U. S. 280; *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Clifford,* 309 U. S. 331 * * *. The declarations of trust passed nothing more than mere legal title to the trust corpus. The trusts contributed nothing more in return. This was insufficient to establish the trusts as partners, subpartners, or joint venturers in the Boyt Partnership enterprise.

lerer v. *Commissioner,* 203 F. 2d 100 (C. A. 7th), certiorari denied, 345 U. S. 995.[4]

The propriety of this conclusion, and the absence of occasion for further review, remains clear despite taxpayers' claim (Pet. 19-26) of conflict with numerous decisions of other courts of appeals. Divergences of result in family partnership cases of this type follow from the infinitely variable fact situations they present. The governing rules, if not always simple to apply, are not in controversy. And the instant case, at any rate, falls clearly within the area where empty legal formalities, transparently designed for the purpose of escaping taxes, effect no change of substance in the ownership of property or the income therefrom.

---

[4] Petitioners contend (Pet. 16-17, 28-32, 35-40) that the case should have been remanded for a finding whether there was a *bona fide* joint venture. The short answer to this contention is that the findings of the Tax Court, approved by the Court of Appeals,—that the grantors retained substantial ownership of the interests they had assigned and continued to control their partnership and earn its income as before—clearly and necessarily negate the existence of any genuine subpartnership or joint venture with the trusts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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L. W. POST,
Special Assistants to the Attorney General.

MAY 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the part-

nership, computed as provided in section 183(b).

(26 U. S. C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person.*—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(a)-1. *What Included in Gross Income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, divi-

dends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * * Income may be in the form of cash or of property.

* * * * *

SEC. 29.181-1. *Partnerships.*—Partnerships as such are not subject to the income tax imposed by chapter 1, but are required to make returns of income. (See sections 187 and 188.) For definition of what the term "partnership" includes, see section 3797(a)(2).

SEC. 29.182-1. *Distributive Share of Partners.*—(a) Each partner is required to include in his return for his taxable year within which or with which the taxable year of the partnerships ends, whether or not distributed:

* * * * *

(3) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

* * * * *

SEC. 29.3797-4. *Partnerships.*—The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as

known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. * * *

* * * * *

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